BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of IP-Enabled Services *WC Docket No. 04-36*

COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits these initial comments on the questions raised by the March 10, 2004 Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking* (FCC 04-28) ("*NPRM*" or "rulemaking").

I. NARUC'S INTEREST

NARUC is a nonprofit organization founded in 1889. Its members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,[1] energy, and water utilities. Congress and the courts[2] have consistently recognized NARUC as a proper entity to represents the collective interests of the State public utility commissions. In the Federal Telecommunications Act,[3] Congress references NARUC as "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities.[4]

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[1] NARUC's member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competing local exchange carriers (LECs). These commissions are obligated to ensure that local phone service supplied by the incumbent LECs is provided universally at just and reasonable rates. They have a further interest to encourage LECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. See, e.g., 47 U.S.C. § 252 (1996).

[2] See *United States v. Southern Motor Carrier Rate Conference, Inc.,* 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC,* 513 F.2d 1142 (9th Cir. 1976).

[3] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq*., Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("Act" or "1996 Act").

[4] See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC,* 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "…Carriers, to get the cards, applied

NARUC's interest in this proceeding is the same as that which led the association to file comments in the several other FCC proceedings on the issue of how to treat voice-over-the-internet traffic and IP-based communications in different network configurations.

In February 2003, NARUC passed a resolution that notes "a significant portion of the nation's total voice traffic could be transported on IP networks within a few years" and urges the FCC to "confirm its tentative decision that certain phone-to-phone calls over IP networks are *telecommunications services*." The resolution also asked the FCC to have the Section 706 Joint Conference ". . .systematically address issues relating to Voice Over the Internet Protocol and to explore, with the States and the appropriate joint boards, and with industry, mutually satisfactory methods of dealing with the related jurisdictional rate and separations issues, including but not limited to reviewing, revising and simplifying the varied existing intercarrier compensation regimes while preserving universal service."

Subsequently, at our November 2003 meeting, the association passed another resolution on "information services" that provides additional details that the FCC should consider in making service classifications including the (1) uncertainty and reduced capital investment while the scope of the FCC's authority under Title I is tested in the courts; (2) the loss of consumer protections applicable to telecommunications services under Title II; (3) the disruption of traditional balance between federal and State jurisdictional cost separations and the possibility of unintended consequences and increased uncertainty; (4) the increased risk to public safety; (4) the loss of State and local authority over emergency dialing services; and (5) the potential for a reduced support base for federal and State universal service as well as State and local fees and taxes.

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to…(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.)

II. INTRODUCTION

The NPRM poses a number of broad questions for resolution – specifically seeking comment on jurisdictional and other regulatory issues surrounding services that use Internet Protocol ("IP"), which the FCC termed "IP-enabled services."[5] Many of the questions fall squarely within the bounds of both resolutions. Both are attached as Appendices to this pleading.

NARUC's comments focus on the service known as Voice over Internet Protocol ("VoIP"), which the NPRM describes as an IP-enabled service "offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony."[6] Before reaching any conclusions with respect to such services, NARUC respectfully suggests that there are two overarching key questions of Congressional intent inherent in the FCC's proposals that require resolution: (1) Did Congress intend real time point-to-point voice communications offerings advertised as a substitute for, competing directly with, and in every key aspect functionally equivalent to existing voice services offered by traditional common carriers to be subject to a different regulatory classification? (2) Regardless of the regulatory classification applied to a particular service, is there any characteristic of this technology that suggests preemption of State oversight that is sufficient to rebut the presumption against preemption that is specified in the statute[7] and inherent in the jurisprudence?[8] The proper response to both questions is no. This view of Congressional intent results in a policy approach to IP-based services that avoids regulatory arbitrage and allows the market to select the most efficient competitor, while leaving minimum Federal and State reliability and security oversight intact.

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5 See *NPRM*, ¶ 1.

6 See *NPRM*, n. 7.

7 See, e.g., 47 U.S.C.§ 615 (1999), 47 U.S.C.§ 253(b) (1996), and Pub. L. No. 104–104, §601(c)(1), 110 Stat. 56 (1996), 47 U.S.C. § 152 note.

8 When a field has been traditionally occupied by the States, the Supreme Court assumes that federal law does not supersede the historic police powers of the States "unless that was the clear and manifest purpose of Congress." *Hillsborough County vs. AMLI,* 471 U.S. 707, 715 (1985). See also *Cipollone v. Ligget Group*, 505 U.S. 504, 518 (1992). Until 1996, States had exclusive control over intrastate local competition; with the Act's passage, regulation of local exchange competition is no longer within the *exclusive* control of the States. *See AT&T Corp. v. Iowa Utilities. Board*, 525 U.S. 366, 381, n.8 (1999). Instead, a dual regulatory system was established. Preemption provisions should be read with a reasoned understanding of the way in which Congress intended the federal statute and its surrounding regulatory scheme to affect business, consumers, and the law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996).

II. DISCUSSION

A. "REGULATORY JURISDICTION SHOULD BE BASED, WHENEVER POSSIBLE, ON THE CHARACTERISTICS OF A SERVICE, NOT ON THE TECHNOLOGY USED TO PROVIDE THAT SERVICE, WHETHER THE SERVICE IS COMMINGLED WITH ANY OTHER SERVICE OR THE SPEED OR CAPACITY OF THAT SERVICE."

The Commission solicits comment generally in two broad areas that parallel the questions posited supra. First, the *NPRM* seeks comment on how, if at all, it should differentiate among various IP-enabled services to ensure that any regulations applied to such services are limited to those cases in which they are appropriate asking (i) if and how IP-enabled services should be divided into discrete categories, and (ii) if there are characteristics of particular VoIP or other IP-enabled services that suggest that providers use the underlying network in different ways or provide different functionality to end users that warrants differential treatment?[9]

The second group of questions focuses on jurisdiction. Specifically, the *NPRM* asks if the FCC should exercise its "ancillary authority" under Title I of the Act to apply (for the first time) select common carrier requirements to an as yet undefined class of information services.[10] The *NPRM* also asks whether, and on what grounds, the Commission should preempt state regulatory jurisdiction over one or more classes of IP-Enabled service, and it recites numerous grounds for preemption.[11] Alternatively, the Notice observes that the Commission may forbear from applying specific provisions of Title II of the Act. Id.

Although the queries in each group raise different issues, the central thrust of NARUC's November 2003 resolution suggests answers to both series of questions. Specifically, the November 2003 resolutions posits as its central resolve an approach that is not only consistent with the functional

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[9] Id., ¶35.

[10] Id., ¶¶ 27, 42.

[11] These included: that federal regulation may "occupy the field;" that the matter may concern an inseparably mixed use where state regulation would negate valid Commission regulatory goals; that the Commerce Clause limits state regulation of IP-Enabled services; and that Section 253 of the Act prohibits states from prohibiting entry into telecommunications markets. Id., ¶ 41.

approach inherent in the controlling legislation,[12] and past commission and court precedent, but also is perhaps the only economically sound approach to classification concerns.

A Functional Approach Is Desirable From A Policy Perspective.

The resolution states: ". . .regulatory jurisdiction should be based, whenever possible, on the characteristics of a service, not on the technology used to provide that service, whether the service is commingled with any other service or the speed or capacity of that service."

Any other approach runs the risk of the regulator effectively choosing technology winners by allowing inter- or intra-jurisdictional regulatory arbitrage – rather than allowing markets to sort out the most efficient competitors. NARUC's position is consistent with both Chairman Powell's 2001 warning that "Government is at its worst when it attempts to pick competitive winners over losers, or worst when it tries to pick a technology," [13] and also the *NPRM* statement in ¶ 61 that: "[a]s a policy matter…any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network."

Paragraph 37 of the *NPRM* correctly indicates that VoIP and IP-enhanced communication services come in many forms. The functional approach of the NARUC resolutions *suggests* that the Commission should apply the same Title II scheme to those VoIP services that, from the perspective of the end user, are similar in functionality to and serve as substitutes for traditional telephone service, i.e., applied to services that enable the end user to engage in the real-time transmission and reception of voice messages.

VoIP services marketed to customers as substitutes for telephone service, that have the capability to originate or terminate calls on the PSTN, that originate on the PSTN, or that use telephone numbers

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[12] See, 47 U.S.C. § 153(43)(44) & (46) defining (i) "Telecommunications Services" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used, (ii) "Telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received," and pointing out that (iii) "A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services."

[13] "Powell Sees Limited Government Role for Rural Broadband," *Local Competition Report* (June 18, 2001) ("Powell repeated familiar themes. . . The FCC will allow the markets to pick the winners: 'Government is at its worst when it attempts to pick competitive winners over losers, or worst when it tries to pick a technology.'")

administered in accordance with the NANP seem clear candidates for this category of service providers. Categories of services should not be based on technology. The public telephone network has constantly evolved since the first phone was put into service over 100 years ago. Digital switches and fiber rings are profoundly different than cord boards and a single strand of copper, but the core service used by customers remains fundamentally the same. New methods of delivering telephone service do not alter the fact that telephone service must continue to be reliable and affordable.

A Functional Approach Is Required by the Act.

There is no question that a functional approach is the preferred policy. However, underlying the NPRM is also the legal question. LEC real time point-to-point voice services are "telecommunications services." *Can the statute be read to permit different treatment of voice services that, from the enduser's perspective, are functionally equivalent?*

In § 153(46), Congress made clear that distinctions in technology deployed to transmit voice communication are not relevant in classifying a service as a "telecommunications service." 47 U.S.C. § 153(46). Congress' definition of "advanced telecommunications capability" in § 706 likewise makes clear that such capability is "without regard to any transmission media or technology" and "enables users to originate and receive high-quality voice …telecommunications using any technology." 47 U.S.C. § 157 (reproduced in note thereto). The fact that any service uses IP technology rather than some other technology to deliver its voice telecommunications service is immaterial to a proper classification of the service. By mandating technology neutral determinations, Congress intended that functionally similar services, like basic telecommunications services, be classified similarly. Indeed, the FCC has affirmed elsewhere that telecommunications services are not limited to those employing circuit-switched technology.[14] Moreover, a focus on the functional nature of particular VoIP services *from the end user's standpoint* is consistent with the *1998 Universal Service Report,* where the FCC correctly observed,

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[14] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24032, ¶ 41 (1998). ("Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service. . .The plain language of the statute thus refutes any attempt to tie these statutory definitions to a particular technology").

"Congress' direct[ed] that the classification of a provider should not depend on the type of facilities used … Its classification depends rather on the nature of the service being offered to customers." They also noted: ". . a telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable satellite, or some other infrastructure." *Universal Service Report* at ¶ 59.[15] The nature of the service in turn "depends on the functional nature of the end-user offering." Id. at ¶86. "Congress intended the categories of 'telecommunications service' and 'information service' to parallel the [pre-1996] definitions of 'basic service' and 'enhanced service'" in the 1996 Act. 290 F. Supp. 2d at 999, note 7.

Like traditional voice communication service classified as a "basic service" under the pre-1996 Act precedent, most of the planned "VoIP" voice services – currently offered by companies like Vonage or planned by facilities-based carriers like Qwest, AT&T, Comcast, and BellSouth - do not provide subscribers with additional, different, or restructured information.[16] Nor does the real-time voice service they provide involve subscriber interaction with stored information, which is a characteristic of an "enhanced" or information service. The information transmitted—i.e., the voice communication – is of the subscriber's own design and choosing. The IP technology used to transmit the voice transmission is completely transparent to the calling and called parties and functionally equivalent to existing phone service.

The FCC Should Carefully Consider The Risks Of Creating A New Category Of Information Services Regulated Under Title I.

The NPRM specifically seeks comment regarding which classes of VoIP services are "telecommunications services" under the Telecommunications Act of 1996 ("1996 Act")[17] and thus

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[15] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report to Congress, 13 F.C.C.R. 11501 (Released April 10, 1998) (*1998 Universal Service Report*).

[16] An "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any capability for the management, control, or operation of the telecommunications system or the management of telecommunications service." 47 U.S.C. § 153(20).

[17] Pub. L. No. 104-104, 110 Stat. 56

should be subject to Title II regulation, and which are "information services" that should be regulated under Title I.[18]

NARUC's November Resolution cautions the FCC to consider the negative implications associated with a finding that new IP-based services are subject to Title I jurisdiction.

Specifically, the resolution urges the FCC to consider, among other things, the

- Uncertainty and reduced capital investment while the scope of the FCC's authority under Title I is tested in the courts;
- Loss of consumer protections applicable to telecommunications services under Title II;
- Disruption of traditional balance between federal and State jurisdictional cost separations and the possibility of unintended consequences and increased uncertainty;
- Increases risk to public safety;
- Customer loss of control over content;
- Loss of state and local authority over emergency dialing services; and
- Reduced support base for federal and State universal service as well as State and local fees and taxes,

The specific case of AT&T's current VoIP service, which was the subject of both NARUC's February 2003 resolution and a recent FCC order, provides a useful example for a proposed functional analysis of new services that is consistent with the statute and past FCC precedent.

NARUC's February resolution urged the FCC to "confirm its tentative decision that certain phone-to-phone calls over IP networks are *telecommunications services*" regulated under Title II. In April – the FCC did just that[19] finding this service to be a "telecommunications service" under Title II.[20]

What does this decision suggest about other VoIP providers - like Vonage, Packet 8, and other facilities and non-facilities based service providers?

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[18] *NPRM*, ¶43.

[19] In 2002, AT&T petitioned to have its services classified as exempt from access charges. Interestingly, AT&T conceded that what it was offering was "basic telephony." See *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC 02-361 (filed Oct. 18, 2002). Based on its classification as basic telephony, AT&T also acknowledged the obligation to contribute to universal service as a telecommunications carrier.

[20] See *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (Released April 21, 2004) (*AT&T Order*), mimeo at 1, ¶ 1("The service at issue in AT&T's petition consists of an interexchange call that is initiated in the same manner as traditional interexchange calls – by an end user who dials 1 + the called number from a regular telephone. When the call reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's Internet backbone. AT&T then converts the call back from the IP format and delivers it to the called party through local exchange carrier (LEC) local business lines. We clarify that, under the current rules, the service that AT&T describes is a telecommunications service upon which interstate access charges may be assessed.")

Like such carriers, AT&T advertises this service generally to the public for a fee, interconnects its VoIP service with the PSTN, utilizes numbers from the North American Numbering Plan, utilizes protocol conversion to permit real-time point-to-point transmission over the Internet, and transmits customer information without a net change in the form or content of the information itself (i.e., the voice communication.[21]

Viewing these services through the classification scheme established by Congress in the statute, it does not appear there are significant differences. Indeed, the only real distinction between services like Vonage's (that terminate calls to the PSTN) and that of AT&T is that *the translation or conversion between digital formats takes place on the customer's side of the network with Vonage, and within the network with AT&T.* That distinction has never been material for regulatory classification purposes.[22] From the end users' standpoint, there is no net change in the form or content of the telecommunications that they receive; the protocol conversion is transparent. Id. Where protocol conversion is used merely to facilitate the provision of an overall basic service, the protocol conversion itself constitutes a basic service.[23]

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[21] Note - Without exception, since Computer II, the FCC has treated voice service that utilizes the public switched network as a "basic transmission service" because the voice communication from the end user's standpoint undergoes no change in the form or content of the information as sent and received. See *Computer and Communications Industry Ass'n. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). The definition of basic service parallels the definition of "telecommunications" in the 1996 Act.)

[22] See footnote 9, supra; Cf. *Universal Service Report*, ¶89 and n. 188.

[23] See *In re Independent Data Communications Manufacturers Ass'n, Inc*., Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶16 (1995). The FCC also said (i) communications between the subscriber and the network for call setup or call routing, and (ii) protocol conversions necessitated by the introduction of new technology are not enhanced services. Id. at ¶¶14-15. The FCC classified frame relay service, a type of high-speed packet switching service, as a basic telecommunications service under Title II. Id. at ¶22. AT&T argued that because protocol conversion was an integral part of its frame relay service offering, the entire offering should be classified as an enhanced service. The FCC disagreed. Focusing on the data transmitted by the customer, the FCC said that regardless of changes made to the frame header, the customer's data contained within the frame are not modified in any way as they travel through the network and arrive intact. Id. at ¶30 The FCC further noted that changes to the header information were in part responsible for the carriage of the customer's data through the network to the proper termination point, and hence are part of a basic transmission service. Id. And perhaps most critically, the FCC found that, to the extent protocol conversion was performed, such conversion did not change the essential character of the frame relay service as a basic common carrier transmission service. Id. at ¶41 In particular, the FCC emphasized that the LECs treated functionally equivalent frame relay service as a basic transmission service. Id. at ¶40. The FCC thus rejected the notion that the mere bundling of a protocol conversion service that might be classified as enhanced altered the fundamental character of the basic frame relay service as a telecommunications transmission service. Id. at ¶40. The FCC's reasoning appears applicable here. Assuming *arguendo,* a carriers protocol conversion service used in conjunction with a basic transmission service is "enhanced", that is irrelevant. The enhanced protocol

B. REGARDLESS OF HOW THE FCC CLASSIFIES SERVICES THAT ARE FUNCTIONALLY EQUIVALENT TO – AND EFFECTIVE SUBSTITUTES FOR – LEGACY TELEPHONY, THERE COMPELLING RATIONALE FOR PREEMPTING ALL STATE OVERSIGHT OF SUCH SERVICES.

As noted earlier, the NPRM proposes several grounds for preempting State oversight including that federal regulation may "occupy the field;" that the matter may concern an inseparably mixed use where State regulation would negate valid Commission regulatory goals, that the Commerce Clause limits State regulation of IP-Enabled services; and that Section 253 of the Act prohibits States from prohibiting entry into telecommunications markets. Id., ¶ 41.

Congress has had no difficulty providing clear direction in the 1996 Act when there is an outright or actual conflict between State and federal law.[24] The absence of similar clarity in regards to telecommunications service provided over the Internet indicates that there is no such conflict.[25] Indeed, far from "occupying the field," the text of the Act itself makes clear that States have an integral and important role to play in protecting *both* competition in telecommunication services and consumers. It is true § 253 expressly provides the circumstances under which State law must yield to federal law and policy for the promotion of competition. However, even § 253 contains an express reservation of authority for States to make regulations for public safety so long as those regulations are applied in a competitively neutral manner.

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conversion service does not change the basic character of the voice service as a telecommunications service. Like AT&T's protocol conversion service, such a service simply facilitates "the overall transparency and efficiency" of the basic voice service. Cf. *Computer II*, Final Decision, 77 F.C.C. 2d 384, 394 (1980). ([T]he confluence of communications and data processing renders unlimited the possible combinations and permutations of services which can be offered to the consumer. *Moreover, we noted that the nature of these services are determined not by the transmission facilities, but, rather, by the specific processing applications offered through electronic equipment attached to the channel of communication.)*

[24] See, e.g., 47 U.S.C § 276 (express preemption of aspects of payphone oversight), 47 U.S.C § 332(c) (preemption of State entry oversight of wireless carriers), 47 U.S.C § 251(e) (express grant of exclusive jurisdiction over numbering issues).

[25] In the 1996 Act, Congress's intent to preserve State authority is repeatedly emphasized. See 47 U.S.C. § 261. (Preserving existing State regulations and allowing States to prescribe new regulations.) See also 47 U.S.C. §§ 252(e)(3) (preserving "requirements of State law in [the State commission's] review of an agreement"); 253(b) (preserving "the ability of a State to impose . . . requirements necessary to preserve and advance universal service . . . and safeguard the rights of consumers"); 254(i) (directing States to ensure that "universal service is available at rates that are just, reasonable, and affordable"); 153(41) (recognizing State "regulatory jurisdiction with respect to intrastate operations of carriers"); 601(c), as codified in notes to § 152; and 706(c), as codified in notes to § 157, (establishing cooperative paradigm where both State and federal authorities are to encourage the deployment of advanced telecommunications capability).

Classification of a particular service as an "information service" – either by FCC precedent pre-1996, or as a result of the amended statutory text post-1996 – neither standing alone provide a basis for preemption of all State oversight. Services that are otherwise defined as subject to State certification as a matter of State law remain subject to State oversight. In *California v. FCC*, 905 F.2d 1217, 1239-1242 (1990), the Ninth Circuit "reject[ed] the FCC's attempt to limit the reach of Section 152(b) to 'intrastate common carrier communication services.'" Relying on *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986) and *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 426 (D.C. Cir. 1989), the court instead "agree[d] with the D.C. Circuit" that the authority reserved to the States under § 152(b) "does not turn on whether the services are provided on a common carrier or non-common carrier basis." Id. at 1242.

A finding that Congress intended to "occupy the field" of *information services*, not only conflicts with decisions of the Ninth and D.C. Circuit Courts of Appeal, but also directly conflicts with § 152(b), which indicates Congress' intent to adopt a dual scheme of regulation of communication services which reaches to both enhanced (information) and basic (telecommunications) services. The Ninth Circuit held that Congress did not intend to divest the State from asserting jurisdiction over intrastate enhanced services. Compare 47 U.S.C. § 541(d)(1) & (2) (preserving State jurisdiction over intrastate communications service provided by a cable system, other than cable service, whether offered on a common carrier or private contract basis).

Congress specified that the provisions of the Act do *not* preempt State authority unless Congress expressly so stated. Section 601 instructs decision makers they are not to find State law to be preempted by mere implication; rather, it specifies, the 1996 Act ''shall not be construed to modify, impair or supersede Federal, State, or local law unless *expressly* so provided.'' Pub. L. No. 104–104, § 601(c)(1), 110 Stat. 56 (1996), 47 U.S.C. § 152 note {Emphasis added}.

A preemptive approach will effectively mandate regulatory arbitrage and undercut public safety and network reliability by forestalling the application of minimal State oversight (oversight that will apply to some but not all of the competing phone service providers because, in this proceeding, of the technology being used or the facilities being used to carry the traffic.)

CONCLUSION

NARUC's resolutions confirm the widely held principle that functionally equivalent services should be treated the same, that regulators should not intervene in markets by favoring one technology over another, that the 1996 Act requires a functional approach, that an approach that treats services that are substitutable for/functionally equivalent to existing telephony services differently is inconsistent with Congressional intent, and that the express terms of the Act does not permit, and an appropriate policy approach would not countenance, preemption of all State oversight.

Respectfully submitted,

/S/

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Appendix A - Resolution Relating To Voice Over The Internet Telecommunications

WHEREAS, The Internet is providing opportunities for new methods to originate, transport, and terminate telecommunications, but is also providing new regulatory challenges, and

WHEREAS, AT&T Corp has filed a petition with the Federal Communications Commission requesting in part that the FCC prevent local exchange carriers from assessing interstate access charges on certain phone-to-phone Voice Over Internet Protocol services, pending adoption of final federal rules, and

WHEREAS, In 1998 the FCC reached a tentative conclusion that certain phone-to-phone IP calls may be telecommunications services, even if the carrier converts such a call to IP format and back again, and that a user who receives only voice transmission without other enhancements is receiving a telecommunications service, not an information service, and

WHEREAS, A decision by the FCC, in this docket or elsewhere, to declare all phone-to-phone calls over IP networks to be information services by virtue of the technology could have negative effects on various telecommunications policies, including universal service, and might be inconsistent with the 1996 Act, and

WHEREAS, Voice over the Internet Protocol and intercarrier compensation issues are inextricably linked, and

WHEREAS, A significant portion of the nation's total voice traffic could be transported on IP networks within a few years, now therefore be it

RESOLVED, By the Board of Directors of the National Association of Regulatory Utility Commissioners, convened in its February, 2003 Winter Meeting in Washington, D.C., that the FCC should confirm its tentative decision that certain phone-to-phone calls over IP networks are telecommunications services, and be it further

RESOLVED, That NARUC asks the 706 Joint Conference to systematically address issues relating to Voice Over the Internet Protocol and to explore, with the States and the appropriate joint boards, and with industry, mutually satisfactory methods of dealing with the related jurisdictional rate and separations issues, including but not limited to reviewing, revising and simplifying the varied existing intercarrier compensation regimes while preserving universal service, and be it further

RESOLVED, That NARUC's General Counsel should file with the FCC comments and ex parte presentations consistent with this resolution.

Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors February 26, 2003

Resolution on Information Services

WHEREAS, Communications consumers are served by an increasing number of technologies in today's markets and these technologies will continue to evolve and develop in the future; *and*

WHEREAS, The existing legal and regulatory constructs evolved in markets where almost all consumers were served by the public switched network and that new constructs will need to evolve and develop; *and*

WHEREAS, These FCC decisions and proceedings have or may assert jurisdiction under Title I over new technologies but without acknowledging that those technologies utilize and include telecommunications services; *and*

WHEREAS, When it passed the Telecommunications Act of 1996, Congress established a definition of "information services" and validated the FCC's previous rulings that enhanced services should be regulated on a different basis than telecommunications services; but Congress did not state that services that combine elements of information services and elements of telecommunications services should be regulated under Title I; *and*

WHEREAS, In 1998 the FCC reported to Congress that carrier regulation should be applied solely to companies that provide underlying transport, and not to the "information services" that are "built on top" of those facilities, and it tentatively concluded that certain phone-to-phone VOIP calls "bear the characteristics" of telecommunications services; *and*

WHEREAS, The Telecommunications Act of 1996 preserves the jurisdiction of the States to regulate intrastate telecommunications services; *and*

WHEREAS, Telecommunications Services associated with information services may be unregulated or more lightly regulated under the FCC's statutory forbearance powers [47 U.S.C. § 160]; *and*

WHEREAS, In February, 2003, NARUC adopted a resolution regarding VOIP services advising the FCC that a decision declaring all phone-to-phone calls to be information services by virtue of Internet technology might be inconsistent with the 1996 Act and could have negative effects on various telecommunications policies, including universal service, *now therefore be it*

RESOLVED, That the National Association of Regulator Utility Commissioners (NARUC), convened in its November 2003 Annual Convention in Atlanta, Georgia, that, in accordance with the principle of technological neutrality, regulatory jurisdiction should be based, whenever possible, on the characteristics of a service, not on the technology used to provide that service, whether the service is commingled with any other service or the speed or capacity of that service; *and be it further*

RESOLVED, That NARUC urges the FCC to carefully consider the following:

- Uncertainty and reduced capital investment while the scope of the FCC's authority under Title I is tested in the courts;
- Loss of consumer protections applicable to telecommunications services under Title II;
- Disruption of traditional balance between federal and State jurisdictional cost separations and the possibility of unintended consequences and increased uncertainty;
- Increases risk to public safety;

- Customer loss of control over content;
- Loss of state and local authority over emergency dialing services; and
- Reduced support base for federal and State universal service as well as State and local fees and taxes, *and be it further*

RESOLVED, That State and federal regulators should work together to adapt their regulatory oversight to the technological changes in communications markets so that all consumers receive the benefits of these new technologies; *and be it further*

RESOLVED, that NARUC General Counsel is authorized to make filings consistent with this resolution, including filing *amicus curiae* briefs in court proceedings.

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Sponsored by the Committee on Telecommunications
Recommended by the NARUC Board of Directors, November 18, 2003
Adopted by NARUC Convention, November 19, 2003